

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MADELEINE GARZA, an individual,
Plaintiff,

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION d/b/a AMTRAK,
Defendant.

No. 3:18-cv-05106-BHS

**PLAINTIFF'S MEMORANDUM
REGARDING JURY INSTRUCTIONS**

PLAINTIFF'S MEMORANDUM REGARDING DR.
AMIR MATITYAHU'S OPINIONS ON OBSTETRIC
ISSUES

3:18-cv-05106-BHS



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Plaintiff Madeleine Garza respectfully offers this memorandum to assist the Court in narrowing the remaining issues with respect to the proposed jury instructions.

1. Parties' Joint Proposed Jury Instructions

Plaintiff has reviewed the Parties' Joint Proposed Jury Instructions¹ against the Court's Final Instructions to the Jury² in *Wilmotte / Skyllingstad v. Nat'l R.R. Passenger Corporation, d/b/a Amtrak*, No. 2:18-cv-00086-BHS. Plaintiff confirmed that all nineteen of the Joint Proposed Jury Instructions were the same given in the Court's Final Instructions in *Wilmotte / Skyllingstad* save for an instruction regarding publicity during trial which the parties in this case have jointly proposed. 9th. Cir. Model Civil Jury Instruction No. 1.16.

2. Parties' Joint Disputed Jury Instructions

With respect to the Joint Disputed Jury Instructions³, Proposed Instructions Nos. 20 through 29 are not pertinent in the present compensatory damages trial as they pertain to Plaintiff's claim under the Washington Consumer Protection Act. Plaintiff also withdraws Proposed Instructions Nos. 1 through 4 and 6 through 11. Additionally, Plaintiff indicated to the Court in her Supplemental Jury Instruction⁴ that she has withdrawn her claim for future economic damages and therefore withdraws Proposed Instructions Nos. 15 and 17.

¹ Dkt. 58.

² Dkt. 119.

³ Dkt. 57.

⁴ Dkt. 78.

1 What remains at issue regarding jury instructions are the Parties' Disputed Jury
 2 Instructions Nos. 5, 12, 13, 14, and 19, as well as the Plaintiff's Supplemental Jury Instruction
 3 filed on November 4, 2019⁵.

4 Regarding Plaintiff's Proposed Instructions Nos. 12, 13, and 14, these are the jury
 5 instructions pertaining to admitted liability. Plaintiff acknowledges that the Court did not
 6 provide these instructions in the Court's Final Instructions to the Jury in *Wilmotte / Skyllingstad*
 7 but rather inserted the following sentence into the damages instruction: "Amtrak has admitted
 8 that it is liable for all damages caused by the derailment." Plaintiff defers to the Court whether
 9 it sees fit to use the admitted liability instructions based on the WPIs (Instructions Nos. 12, 13,
 10 and 14) or inserting the same language from the *Wilmotte / Skyllingstad* damages instruction.
 11

12 Plaintiff's Proposed Instruction 19 is a mortality table instruction. This instruction was
 13 given in the Court's Final Jury Instructions in *Wilmotte / Skyllingstad* and Plaintiff respectfully
 14 requests that the same instruction be given here.
 15

16 Defendant's Proposed Instruction No. 5 is not a pattern jury instruction nor do the cases
 17 Defendant cites to as authorities affirmatively state that such a jury instruction is required. The
 18 instruction also unnecessarily reiterates the burden of proof instruction which is already jointly
 19 proposed by the parties and based on the Ninth Circuit Model Instruction No. 1.6. Moreover,
 20 none of the cited authorities have anything to do with the jury instructions regarding future
 21 medical risks. *Hausman v. Holland America Line-USA*⁶ stands for the principle that medical
 22

23
 24
 25 ⁵ *Id.*

26 ⁶ *Hausman v. Holland America Line-USA*, No. 13CV00937-CJR, 2015 WL 9839747 (W.D. Wash. Aug. 21, 2015).

1 testimony used to show causation must be offered on a more probable than not basis. The case
 2 does not support the jury instruction that “any such future medical risk [must be] proven through
 3 medical expert testimony by a preponderance of the evidence.” *Luttrell v. Novartis Pharm.*
 4 *Corp.*⁷ and *McLaughlin v. Cooke*⁸ reiterate this standard for medical expert testimony. The
 5 limiting instruction proposed in Defendant’s Proposed Instruction No. 5 is not required by the
 6 cited authorities and has more of a tendency to confuse the jury than to be helpful.

8 **3. Plaintiff’s Supplemental Jury Instruction**

9 Lastly, Plaintiff proposes her Supplemental Damages instruction which includes a
 10 damage element for the fear of present and future health problems, including the reasonable
 11 fear of an increased risk of injury. Regarding her fear of future health problems, Ms. Garza
 12 testified as follows:

13 “I have been told by doctors that it could cause me discomfort, and I could, like
 14 -- they said – what was the word? Arthritis. They said I could develop arthritis,
 15 which is something you also don't want to hear when you are 18, that you could
 16 get arthritis and have that be something you have to worry about.”

17 Verbatim Report of Proceedings, November 8, 2019 at 95:2-7. Given this testimony, the
 18 proposed damages element is appropriate. *Wilson v. Key Tronic Corp.*, 40 Wash. App. 802,
 19 810, 701 P.2d 518, 524 (1985) (“Fears of present and future health problems [. . .] are not
 20 remote and fanciful, but rather are reasonable and therefore compensable.”); *Sorenson v.*
 21 *Raymark Indus., Inc.*, 51 Wash. App. 954, 958, 756 P.2d 740, 742 (1988) (“Our courts long
 22 have recognized that a plaintiff may recover for anxiety, arising from a current reasonable fear
 23

24
 25 ⁷ *Luttrell v. Novartis Pharm. Corp.*, 894 F. Supp. 2d 1324, 1340 (E.D. Wash. 2012), aff’d, 555
 F. App’x 710 (9th Cir. 2014).

26 ⁸ *McLaughlin v. Cooke*, 112 Wash.2d 829, 836, 774 P.2d 1171 (1989).

1 of future injury or illness, and resulting from an injury caused by the defendant”); see *Elliott v.*
2 *Arrowsmith*, 149 Wash. 631, 633, 272 P. 32 (1928).

3 Lastly, Plaintiff also submitted with her supplemental jury instruction a revised verdict
4 form which has one line for past and future non-economic damages. This verdict form conforms
5 to the verdict form in Wilmotte / Skyllingstad as to non-economic damages. Plaintiff therefore
6 requests the same verdict form for non-economic damages be given here.
7

8 DATED: November 11th, 2019.

9
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CERTIFICATE OF SERVICE

I, **Sarah Awes**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala, PLLC, and that on the below date I caused to be served the foregoing document on:

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DATED this 11th day of November, 2019.

/s/ Sarah Awes

Sarah Awes

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